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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OMAR RAMOS, Defendant and Appellant.	B210553 (Los Angeles County Super. Ct. No. NA077515)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Omar Ramos appeals from the judgment entered following a jury trial in which he was convicted of making criminal threats against victim Guadalupe Cisneros (Pen. Code, § 422). He was sentenced to prison for three years and contends the trial court committed prejudicial instructional error. For reasons stated in the opinion, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On February 23, 2008, at approximately 2:20 a.m., Guadalupe Robles Cisneros was driving an MTA bus in the area of Long Beach Boulevard and 68th Street when appellant boarded. Appellant struggled to put his bike on the bike rack and then started "rambling," asking Cisneros if she had "a piss cup." Cisneros asked appellant, "What?" and he said, "I have to take a piss." Cisneros told appellant he had to get off the bus and he said, "Call the fucking sheriff. They ain't going to do shit to me." Appellant told Cisneros in Spanish that he was going "to slice [her] throat." He kept repeating that threat and also said, "I'm going to take this mother fucker hostage [referring to the bus]." Appellant was standing close to Cisneros and Cisneros was frightened. Cisneros saw Long Beach Police Officer Dave Okerman across the street and signaled for him to approach the bus.

When Officer Okerman arrived, he tried to get appellant off the bus. Appellant continued to threaten Cisneros and started threatening the officer. When appellant stated he had "a 40 Glock," the officer pulled appellant out and searched him. Appellant threatened Cisneros stating, "I know your route, I know your bus number, I know where you're at." When the officer asked appellant if that was a threat, appellant stated, "It is what it is." During a search for weapons, Officer Okerman recovered a 3-inch Smith & Wesson folding pocket knife. Appellant appeared to have been drinking alcohol but Officer Okerman would not say appellant was intoxicated.

Appellant testified in defense that he had just left a club and had had a few drinks. He had had four rum drinks and, before he got on the bus, he had had a beer. When he got on the bus, he had a lot of foam to spit out and had asked for a cup or trash bag. Appellant opined the smell of liquor may have bothered Cisneros. Appellant was feeling the effects of the alcohol he consumed and when asked if he would describe himself as

"buzzed, drunk, what?" appellant testified, "buzzed." Appellant did not make any threats to the bus driver and did not want to get off the bus because it was late and he did not want to be "stranded." Appellant denied telling Cisneros he had her bus number or her route number.

Appellant testified he struggled to put his bicycle into the bus bike rack because his bike had "pegs" and he was trying to lock it. Appellant opined Cisneros was angry with him for taking so much time to secure his bike.

The trial court refused to give an instruction on voluntary intoxication, finding there was insufficient evidence and noting that appellant had even testified he was not drunk. The court also refused to give a unanimity instruction, stating any one of the threats would suffice.

DISCUSSION

I

Appellant contends, accepting Cisneros's testimony as true, there were multiple acts that could have supported a conviction for terrorist threats and that it was therefore incumbent upon the trial court to give a unanimity instruction in the form of Judicial Council of California Jury Instructions (2007), No. CALCRIM 3500.[1] We disagree.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

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[1] CALCRIM No. 3500 provides in pertinent part: "The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

Here, the acts constituting the threats were so closely connected they formed "one continuous transaction . . . and thus it would have been inconceivable for a juror to believe that defendant committed one [threat], but disbelieve he committed the other. [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 561.) Even assuming multiple threats occurred, there was no evidence from which the jury could have found appellant guilty of one but not another. Appellant offered the same defense to all of the acts, i.e., that he did not commit them. No reasonable juror could have believed appellant made one criminal threat but disbelieved that he committed the other. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1199; *People v. Carrera* (1989) 49 Cal.3d 291, 311-312.)

II

Appellant contends the trial court committed reversible error by not instructing the jury on voluntary intoxication. Appellant testified that he had had four rum drinks that evening and before getting on the bus had had a beer. When asked to describe his condition, he stated he was "buzzed" rather than drunk. Officer Okerman testified appellant appeared to have been drinking alcohol but was not intoxicated.

Penal Code section 22 provides, "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. ¶ (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. ¶ (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance."

The crime of making a criminal threat contains the element that the defendant have the specific intent that his statement be taken as a threat. (Pen. Code, § 422.) Thus evidence of voluntary intoxication was admissible on the issue of whether appellant

actually formed the required specific intent. Appellant asserts the evidence presented a compelling scenario that he was "merely hateful and drunk" rather than that he was a criminal intending to convey a serious threat, and that an instruction on voluntary intoxication would have provided the platform for that argument.

"[A] defendant is entitled to an instruction on voluntary intoxication 'only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's "actual formation of specific intent."' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 715.) "[W]hen there is no evidence from which a jury could conclude that as a result of voluntary intoxication the defendant failed to form the requisite criminal intent or attain the requisite mental state, instructions on the defense of voluntary intoxication may properly be refused. [Citations.]" (*People v. Williams* (1988) 45 Cal.3d 1268, 1311.)

Here, appellant testified he was only "buzzed" when defense counsel asked him if he would describe himself as "buzzed, drunk, what?" Further, Officer Okerman testified that while it appeared appellant had been drinking alcohol, he was not intoxicated. While appellant now argues he had difficulty placing his bike in the bus bike rack because he was intoxicated, at trial he testified the difficulty arose because the bike had pegs. There was no substantial evidence presented that appellant was intoxicated, and the trial court properly refused an instruction on voluntary intoxication.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.